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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 630

BARD-PARKER COMPANY, INC., *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STANLEY WORTH,
404 Transportation Bldg.,
Washington 6, D. C.,
Counsel for Petitioner.

Of Counsel:
BLAIR, KORNER, DOYLE & WORTH.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Bard-Parker Company, Inc., prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Second Circuit in the above case.

OPINIONS BELOW

The findings of fact and opinion of the Tax Court of the United States are reported at 18 T.C. 1255. A copy thereof is included in the record below (R. 3-14). The

opinion of the United States Court of Appeals for the Second Circuit is not yet reported. A copy thereof is appended (App. 6).

JURISDICTION

The judgment of the United States Court of Appeals was entered December 6, 1954 (R. 69). Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1), 62 Stat. 928.

QUESTIONS PRESENTED

With the ultimate object of determining the petitioner's basis for invested capital purposes of property paid in for its capital stock, the following questions are presented:

1. Where, pursuant to a preconceived plan, the liquidating directors of a dissolved predecessor corporation transferred all of its properties, and, concurrently, certain individuals transferred other properties and cash, to the petitioner for its capital stock, preferred and common, may such interdependent transfers be treated separately for Federal tax purposes, one transfer constituting a tax free exchange under Section 112 (b) (4), and the others taxable exchanges for failure to meet the requirements of Section 112 (b) (5), of the Revenue Act of 1928?

2. In any event, did the transfer of the properties of the dissolved corporation meet the requirements of Section 112 (b) (4)?

3. Do services constitute "property" within the meaning of Section 718 (a) (2) of the Internal Revenue Code?

STATUTES INVOLVED

The pertinent provisions of the applicable statutes are set forth in the Appendix, as follows:

Internal Revenue Code (26 U.S.C., 1946 Edition), Sections 113 (a) (7) and (8), 718 (a) (2) (App. 1-2).

Revenue Act of 1928 (c. 852, 45 Stat. 791) Sections 112 (b) (4) (5), 112 (i), 112 (j), 701 (a) (1) (App. 2-3).

Stock Corporation Law of New York, Sections 22, 29, 69 (App. 3-6).

STATEMENT OF THE CASE

Bard-Parker Company, Inc. (hereinafter referred to as the "old company") was organized under the laws of New York in 1916. Its authorized capital stock of $10,000 consisted of 80 shares of 7 per cent non-voting preferred stock of $50 par value and 120 shares of $50 par value common stock. Twenty shares of common stock were issued for cash; the remainder were issued for patents and patent applications upon detachable-blade surgical knives invented and owned by Morgan Parker. The preferred stock was donated back to the corporation where it was held as treasury stock. Morgan Parker became the sole stockholder of the old company in 1923, and in 1925 he sold 30 shares of common stock to James White, retaining for himself the remaining 90 shares. An agreement, hereinafter referred to as the "Syndicate Agreement" was entered into on July 28, 1927, between Morgan Parker, the old company and other persons referred to as "subscribers". A plan was formulated whereby detachable blade scissors invented by Morgan Parker would be produced in a limited quantity by the old company which had been engaged in the manufacture and sale of detachable knife handles and blades to determine the best method of production and the probable commercial market. It was contemplated that a corporation would be organized to manufacture the scissors. The stock in the new corporation was to be issued for the scissors patents except for the required number of shares issued for cash for organizational purposes. All the preferred and 20 per cent of the common were to be donated back to the treasury. Morgan Parker was to receive ¼ of the remaining 80 per cent of common stock, a similar portion was to be given to the subscribers, and ½

to the old corporation. Morgan Parker agreed to convey to the prospective corporation all of the scissors Patents and improvements thereon. The old company agreed to authorize the issuance of 7 per cent preferred stock of $100 par value to be sold to the subscribers and to use the proceeds in a special fund for the development of the scissors. The subscribers were given the election of converting their preferred shares into stock of the prospective corporation. The Certificate of Incorporation of the old company was amended to allow authorization of $50,000 of 7 per cent non-voting preferred shares of $100 par value and to permit the old company to acquire stock in the contemplated corporation. (R. 3-4)

Subscriptions to the preferred stock of the old company aggregating $50,000, were made by the subscribers, persons not previously interested in the old corporation. In 1928, J. W. B. Ladd was employed by the old company as a mechanical engineer and he engaged in inventive work upon the scissors resulting in improving patents issued to Morgan Parker and himself. In March, 1930, the development work had reached the stage where manufacturing could begin, but it was decided that the initial commercial venture would be in the small field of surgical scissors. It appeared advantageous commercially and economically to have the new corporation market the scissors under the name of the old corporation. (R. 4)

Accordingly, the stockholders of the old corporation, at a special meeting, expressed their desire to dissolve the old corporation and to sell the assets and distribute the proceeds. They passed resolutions on March 12, 1930, consenting to the formation of a new company of the same name and the dissolution of the old company, 15 days thereafter, as provided by Section 22 of the Stock Corporation Law of New York. It was also resolved to have the directors sell the assets, good will and corporate name of the old company to the new corporation. Preferred stock of the new corporation was to be received for the value of

the physical assets and net worth, and common stock of the new corporation aggregating a par value of $750,000 was to be taken in payment for all other property including good will and the right to use the corporate name. The new corporation, Bard-Parker Company, Inc. (hereinafter referred to as the petitioner), was incorporated in New York on April 8, 1930. The old company was automatically dissolved on April 24, 1930. The authorized capital stock of the new corporation was $1,950,000, consisting of 4,500 shares of $100 par value 7 per cent cumulative preferred and 150,000 shares of $10 par value common stock. The petitioner, through its directors, purchased the tangible assets of the old company from the liquidating directors of that corporation on April 28, 1930, for $209,300 par value preferred stock and the assumption of liabilities of $18,855.59. The intangible assets of the old company were purchased for $750,000 par value common stock of the petitioner. The memorandum of agreement states that the old company had been dissolved. (R. 5)

The liquidating directors of the old company listed the shareholders of that corporation and the number of preferred and common shares to be issued to each in payment of the tangible and intangible assets of the old company. The preferred shareholders of the old company received $50,000 par value in preferred shares of the petitioner. The remaining $159,300 of the purchase price of the tangible assets was paid to the common stockholders of the old company in the ratio in which they owned stock of their corporation, 75 per cent or $119,475 par value to Morgan Parker and 25 per cent or $39,825 par value to James White. The common stock of the new corporation was issued in the same ratio, $562,500 par value to Parker and $187,500 par value to White. (R. 5-6)

On the same date the directors of the petitioners authorized the purchase of certain patents and applications covering detachable blade scissors, accepting an offer made by Harry B. Arden. These patents and applications pur-

chased by the petitioner for $750,000 through Arden were owned by Morgan Parker. Arden, in completing the transaction, listed the persons to be issued the $750,000 par value of common stock in exchange for the patents. The reason for issuing the stock to others than the owner of the patent was said to be to induce those other persons to finance the syndicate. The subscribers to the $50,000 par value of the old company preferred stock were to receive 15,000 shares in this transaction. Morgan Parker was to receive 33,750 shares and James White was to receive 11,250 shares. Frederic Bard, an attorney who acted for the syndicate, was to receive 14,750 shares as part of this transaction for the patents. Eugenia E. Ehnen, Frederic Bard's secretary, was to receive 250 shares. Frederic Bard retained only 4,000 shares of common stock, 750 shares being transferred to Morgan Parker, 1,500 shares to J. W. B. Ladd, and 8,500 to the petitioner's treasury. Additional capital was obtained by petitioner through the installment sale for cash of $101,000 par value preferred stock principally to the original subscribers for preferred stock of the old corporation. Included in these sales were purchases by J. W. B. Ladd and the Crescent Manufacturing Company, who were not original subscribers. Gain or loss was not reported by petitioner or Morgan Parker from the transactions involving the purchase by petitioner of the old company's assets and Morgan Parker's patents. (R. 6)

J. W. B. Ladd received $50,000 par value in common stock of the petitioner for his services resulting in improvements to the detachable blade scissors. An amendment of petitioner's charter reducing the authorized preferred stock from 4,500 to 4,000 $100 par value shares and increasing the authorized common stock from 150,000 to 155,000 $10 par value shares, was made in order to make this distribution possible. (R. 7)

In its excess profits tax returns for the years 1941 to 1944, inclusive, the petitioner included in its invested cap-

ital the full par value of its common stock which the respondent, in his notice of deficiency eliminated, thereby determining deficiencies in excess profits taxes for each year. (R. 3)

The Tax Court sustained the Commissioner in holding that the $750,000 common stock issued for the intangible assets of the old company was a reorganization transaction within the meaning of Sections 112 (b) (4) and 112 (i) (l) (B) of the Revenue Act of 1928, and, accordingly, that Section 113 (a) (7) of the Internal Revenue Code limited the basis to that of the transferor (R. 11). It also sustained the Commissioner in holding that no portion of the $50,000 common stock issued to Mr. Ladd for services was includible in invested capital since services constitute "neither money nor property" within the meaning of Section 718 (a) of the Code (R. 9). The appeal to the Second Circuit was limited to a review of the Tax Court's holding in these two respects.[1]

As to the other $750,000 common stock which was issued at the same time for the scissors patents, the Tax Court disapproved the Commissioner's determination for failure to qualify under Section 112 (b) (5) of the 1928 Act. It found the value of said patents and held such value was properly includible in petitioner's invested capital. (R. 14) Neither side appealed from this holding.

The Second Circuit affirmed the decision of the Tax Court (R. 67, 69). It rejected as untenable the petitioner's contention that the transaction as a whole should have been tested only under Section 112 (b) (5) to determine whether it was nontaxable (R. 62). It held that, on the facts of this case, "there occurred (1) a tax-free reorganization exchange of the old company's intangible assets for new company stock plus (2) a separate non-reorganization exchange of the patents for such stock." (R. 66)

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[1] There is no issue as to the preferred stock issued by petitioner. See Exhibit 36 (R. 43) for a summary of all stock issued and the consideration received therefor.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the Second Circuit erred:

1. In holding that concurrent and interdependent transfers of property to the petitioner in exchange for its common stock were severable for tax purposes, and that one of said transfers involved a nontaxable transaction notwithstanding the other was held to be taxable.

2. In holding that Section 112 (b) (4) of the Revenue Act of 1928 had any application in the instant case.

3. In failing and refusing to hold that since there were interdependent transfers by two or more "persons", the transaction as a whole should have been tested, as to its taxability, solely under Section 112 (b) (5) of said act.

4. In holding that invested capital may not include any amount representing capital stock issued for services.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Decisions Holding That Interdependent Parts of a Single Transaction Are Not Severable for Tax Purposes

It is a well established principle that the individual parts or steps in a unitary transaction may not be treated separately for tax purposes. The parts of a reorganization must be considered as a whole rather than separately. *Helvering* v. *Alabama Asphaltic Limestone Co.*, 315 U.S. 179;[2] *Riddlesbarger* v. *C. I. R.* (CA-7), 200 F.2d 165. "A single transaction may not be broken up into various elements to avoid a tax." *Ahles Realty Corp.* v. *C. I. R.* (CA-2), 71 F.2d 150, 151, cert. den. 293 U.S. 611; *Bassick* v. *C. I. R.* (CA-2), 85 F.2d 8, 10, cert. den. 299 U.S. 592; *West Texas Refining & Development Co.* v. *C. I. R.* (CA-10), 68 F.2d 77; *Prairie Oil & Gas Co.* v. *Motter* (CA-10), 66 F.2d 309; *May Broadcasting Co.* v. *United States* (CA-8), 200 F.2d 852.

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[2] Cited by the Tax Court in the instant case (R. 11).

American Bantam Car Co. v. *C. I. R.* (CA-3), 177 F.2d 513, cert. den. 339 U.S. 920, affirmed per curiam the Tax Court decision, 11 T.C. 397. There (at page 405) the Tax Court stated the question thus:

> An important test is that of mutual interdependence. Were the steps so interdependent that the legal relations created by one transaction would have been fruitless without a completion of the series?

Notwithstanding in the instant case the Tax Court found that the separate transfers were interdependent,[3] it accorded separate treatment to the two transfers, with a hybrid result, and the Second Circuit affirmed.

The fallacy of the opinion of the Court below is apparent from the following excerpt (R. 64-65):

> There were two separate transfers which did not become transmuted into *component steps of a single transfer* merely because separate properties were transferred at the same time to one transferee. These two transfers were not—as in the case of the transfer by the old company to its liquidating directors and the re-transfer by them to the new company—*mere "procedural" steps towards the completion of one transaction.* (Emphasis supplied)

The petitioner never has contended that the two transfers were steps "of a single transfer" nor that they were mere "procedural" steps. It has always contended that the two transfers, while separate, were so interdependent as to require that they be considered together, instead of

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[3] The Tax Court opinion, at page 1260 (R. 11) reads: "The principal reason for the entire transaction was the exploitation of the scissors patents. The dissolution of the old company was but a step in the preconceived plan to bring about the manufacture and sale of the knives and new scissors under the name of Bard-Parker." The old company had never owned the scissors patents. They were transferred to the petitioner "at the same time" (R. 11) that the petitioner acquired the properties of the old company.

separately. Section 112 (b) (5) is specially designed to test the taxability of transfers by two or more "persons" whether such person be an individual, a trust or estate, a partnership, or a corporation.

The decision below is clearly in conflict with the decided cases in holding (R. 66) that "there occurred (1) a tax-free reorganization exchange of the old company's intangible assets for new company stock plus (2) a separate non-reorganization exchange of the patents for such stock."

The opinion below, referring to the 1928 Act, states "Section 112 (b) (4) and (5) are cumulative, not mutually exclusive." It cites *Helvering* v. *Cement Investors, Inc.*, 316 U.S. 527, 533-534, which involved the Revenue Act of 1936 (49 Stat. 1648, 1678, c. 690). Speaking through Mr. Justice Douglas this Court there stated (p. 534):

> The close relationship between § 112 (b) (5) and the "reorganization" provisions is further evidenced by the fact that they overlap to a degree. Thus a transaction which meets the requirements of clause B or clause C of § 112 (g) (1) may also qualify under § 112 (b) (5).

Disregarding the effect on this language of the differences between § 112 (g) (1) of the 1936 Act and § 112 (i) (1) of the 1928 Act,[4] nothing short of a distorted construction would support the conclusion that (b) (4) and (b) (5) are "cumulative" to the point that "a transaction" may be severed into its parts, with the grotesque result that one part was nontaxable under (b) (4), and the other part was taxable for failure to meet the requirements of (b) (5). Obviously, the Second Circuit's reliance on *Helvering* v. *Cement Investors, Inc., supra,* is misplaced.

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[4] See distinction noted in *Helvering* v. *Southwest Consolidated Corp.*, 315 U.S. 194, at p. 198.

II. The Decision Below Refuses to Follow the Decision of Another Circuit, and Is Otherwise Opposed to the Authorities Dealing With the Application of Section 112 (b) (4).

Under comparable facts and circumstances (insofar as the transfer of properties of the old company was concerned), *United States* v. *Arcade Co.* (CA-6), 203 F. 2d 230, cert. den. 346 U.S. 828, held that Section 112 (b) (4) of the Internal Revenue Code (similar in this respect to Section 112 (b) (4) of the 1928 Act) could not apply because the old company had been dissolved prior to the transfer, and, therefore, there could be no compliance with the "strict language of the statute" as to a transfer by the old corporation, nor were there any agreements between the old and new corporations, or exchanges between them, pursuant to a plan of reorganization.[5] It also noted that Treasury Regulations 103, Sec. 19.112 (g)-6 requires that the "plan of reorganization must be adopted by each of the corporations parties thereto; and the adoption must be shown by the acts of its duly constituted responsible officers and appear upon the official records of the corporation."

In footnote 3 of the opinion below (R. 63), the Second Circuit refuses to follow the *Arcade* decision, *supra.*

Apart from the technical reasons advanced in the *Arcade* opinion, there are other cogent reasons why Section 112 (b) (4) should not apply in the instant case. By its plain terms there must be an exchange of property (1) by a corporation[6] (2) which is a party to a reorganization[7] (3)

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[5] At pp. 232-233.

[6] Note the singular "a corporation".

[7] There was no reorganization under Section 112 (i) (1) (B), relied upon by the respondent, since the requirement as to 80% control by the old corporation or its stockholders (as such stockholders) was lacking—this for the reason that at the same time $750,000 common stock was issued by petitioner to acquire the scissors patents.

in pursuance of a plan of reorganization[8] (4) solely for stock or securities in another corporation (5) which is a party to the reorganization.[9] Unless all of these elements are present, Section 112 (b) (4) can have no application. The "reorganization" provisions are restricted to intercorporate transactions, but § 112 (b) (5) is not so confined. *Helvering* v. *Cement Investors, Inc.*, 316 U.S. 527, 533.

It is not mere happenstance that from the decided cases we find implied acceptance by the Commissioner and by the Courts of two propositions:

1. Where Section 112 (b) (4) (or its counterpart) was successfully invoked, (a) the reorganization was the whole transaction, not merely a part of it, and (b) there was only one transfer.[10]

2. In other transactions involving transfers of property for capital stock of a corporation, including transactions in which one or more of the transferors were corporations, the sole test used for recognizing taxable gain was that laid down in Section 112 (b) (5), or its counterpart.[11]

Had the transfer of assets of the old company for petitioner's stock been the entire transaction, it clearly would have been a reorganization exchange under (b) (4), and

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[8] There was no plan of reorganization. The only plan of any kind was that set forth in the Syndicate Agreement of July 28, 1947 (R. 47) as modified to include the purchase by petitioner of the assets of the old corporation.

[9] See footnote 8.

[10] *Helvering* v. *Alabama Asphaltic Limestone Co.*, 315 U.S. 179; *Palm Springs Holding Corp.* v. *C. I. R.*, 315 U.S. 185; *John A. Nelson Co.* v. *Helvering*, 296 U.S. 374; *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378.

[11] *United Carbon Co.* v. *C. I. R.* (CA-4), 90 F. 2d 43; *C. I. R.* v. *Lincoln-Boyle Ice Co.* (CA-7), 93 F. 2d 26; *Budd International Corp.* v. *C. I. R.* (CA-3), 143 F. 2d 784, cert. den. 323 U.S. 802; *Hartford-Empire Co.* v. *C. I. R.* (CA-2), 137 F. 2d 540, cert. den. 320 U.S. 787.

there would have been no controversy. But when the Court below held that "there occurred (1) a tax-free reorganization exchange - - - - *plus* (2) *a separate non-reorganization exchange of the* [scissors] *patents* for such stock (emphasis supplied) (R. 66), then, consistent with the imposing weight of authority, *supra,* it should have ruled out (b) (4), and tested the entire transaction under (b) (5). As it is, the decision below stands as an isolated case without precedent.

III. The Intervention of This Court Is Warranted to Clarify the Scope and Application of Subsections (4) and (5) of Section 112

United Carbon Co. v. *C. I. R.* (CA-4), 90 F.2d 43, has long been regarded as a leading case, and has been consistently followed, in principle, by other courts. See *Blair* v. *C. I. R.* (CA-2), 91 F.2d 992, 995; *C. I. R.* v. *Lincoln-Boyle Ice Co.* (CA-7), 93 F.2d 26; *Budd International Corp.* v. *C. I. R.* (CA-3) 143 F.2d 784, cert. den. 323 U.S. 802. In that case the taxpayer issued all of its stock to acquire the properties of 13 corporations and one partnership.[12] Section 203 (b) (4) of the Revenue Act of 1926 (corresponding with Section 112 (b) (5) of the 1928 Act) was invoked and was held inapplicable because of the disproportionate interests received by the transferors. The 1926 counterpart of Section 112 (b) (4) was not considered.

Somewhat later, the same Circuit Court in *Britt* v. *Commissioner* (CA-4), 114 F.2d 10, in a transaction growing out of that involved in the *United Carbon* case, held that although *United Carbon* was properly decided on the issue presented (203 (b) (4) of the 1926 Act), its decision would have been different if the issue had been presented under (b) (3) of that act (corresponding with Section 112 (b) (4) of the 1928 Act). It then held in the *Britt* case that as

[12] One of the twelve transferor corporations was assignee of the assets of the thirteenth corporation. The facts are more fully stated in 32 BTA 1000.

to the particular corporation there under consideration (1 of 13 involved) the transaction constituted a reorganization, citing *John A. Nelson Company* v. *Helvering*, 296 U.S. 374, and *Helvering* v. *Minnesota Tea Company*, 296 U.S. 378, as authorities. It completely ignored the factual differences between the *Nelson and Minnesota Tea* cases on the one hand, where in each case there was only one transferor, a corporation, and the transaction before it, where the transferors were 13 corporations and one partnership.

As will be noted from the foregoing citations, the other Circuits, including the Second, have consistently followed the *United Carbon* decision and ignored the *Britt* decision. The exceptions are the Court of Claims in *Nelson* v. *United States*, 107 C. Cls. 422, 69 F. Supp. 336, cert. den. 331 U.S. 846, and the case at bar.

The *United Carbon* and *Britt* decisions, both by the same Circuit Court, are irreconcilable. Where some courts rely upon one and others rely upon the other of these conflicting decisions as authorities, uncertainty in this area of tax law will persist. Only the intervention of this Court will clarify this important phase of the law, and resolve existing doubts.

IV. The Holding That Invested Capital May Not Include Any Value In Connection With Stock Issued for Services Is Unrealistic

The holding below is that the market value of stock issued to Mr. Ladd for services was properly excluded from invested capital. The State law[13] providing for the issuance of stock for "labor done" as well as for money or property actually received is waved aside as "irrelevant". Such action is unduly technical and unrealistic.

As a practical matter, whether a corporation issues stock for cash and uses the cash to pay for services, on the one hand, or issues stock directly for the services, the end result is the same. The only difference is as to form,

[13] Section 69, New York Stock Corporation Law (App. 5).

and, in tax matters substance, rather than form, controls. *Helvering* v. *F. & R. Lazarus & Co.*, 308 U.S. 252, 255; *Palmer* v. *Bender*, 287 U.S. 551.

Any building or other structure, or any equipment, represents a combination of materials and labor, and the product of the two is generally understood to be property. The services rendered by Mr. Ladd were in connection with the invention covered by the scissors patents, and presumably added to the value of the invention, thereby increasing its value as property. Only a technical, strained construction of the statute will justify the holding below.

The Court below cites *LaBelle Iron Works* v. *United States*, 256 U.S., 377, 389 and *Simmons Company* v. *Commissioner* (CA-1), 33 F.2d 75 in support of its holding that services do not constitute property (R. 67). The *LaBelle Iron Works* case simply held that appreciation in value of property does not constitute invested capital, and the *Simmons* case held that neither discount sustained nor commissions paid in connection with the sale of taxpayer's stock, was includible in invested capital. Neither case supports the holding below.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

STANLEY WORTH,
404 Transportation Bldg.,
Washington 6, D. C.,
Counsel for Petitioner.

Of Counsel:

BLAIR, KORNER, DOYLE & WORTH.

APPENDIX

APPENDIX

Internal Revenue Code (26 U.S.C., 1946 Edition)

Sec. 113. Adjusted Basis for Determining Gain or Loss.

(a) *Basis (Unadjusted) of Property.* The basis of property shall be the cost of such property; except that . . .

(7) *Transfers to Corporation.* If the property was acquired

(A) after December 31, 1917, and in a taxable year beginning before January 1, 1936, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, or

(B) in a taxable year beginning after December 31, 1935, by a corporation in connection with a reorganization,

then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or securities of the transferee as the consideration in whole or in part for the transfer.

(8) *Property Acquired by Issuance of Stock or as Paid-in Surplus.* If the property was acquired after December 31, 1920, by a corporation

(A) By the issuance of its stock or securities in connection with a transaction described in section 112(b)(5) (including, also, cases where part of the consideration for the transfer of such property, to the corporation, was property or money, in addition to such stock or securities, or

(B) as paid-in surplus or as a contribution to capital, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made.

Sec. 718 (as added by § 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974). EQUITY INVESTED CAPITAL.

(a) *Definition.* The equity invested capital for any day of any taxable year shall be determined as of the beginning of such day and shall be the sum of the following amounts, reduced as provided in subsection (b) . . .

(2) *Property Paid-in.* Property (other than money) previously paid in (regardless of the time paid in) for stock, or as paid-in surplus, or as a contribution to capital. Such property shall be included in an amount equal to its basis (unadjusted) for determining loss upon sale or exchange. . .

Revenue Act of 1928. (c. 852, 45 Stat. 791)

Sec. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.* Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111 shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges solely in kind* . . .

(4) *Same—Gain of Corporation.* No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(5) *Transfer to Corporation Controlled by Transferor.* No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in

exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange . . .

(i) *Definition of reorganization.* As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of reorganization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

(j) *Definition of control.* As used in this section the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

Stock Corporation Law of New York

Sec. 22. *New Corporation may be formed under the same name.* Whenever pursuant to section twenty any domestic

stock corporation, except a railroad or moneyed corporation shall desire to sell and convey its property, rights, privileges and franchises, or any interest therein or any part thereof to a new domestic corporation, the latter may be organized under the same name, provided that:

1. There shall have been included in the stockholder's consent express consent that good will and right to use the corporate name be sold, that a new domestic corporation be organized with the same name to acquire the property, rights, privileges and franchises, or any interest therein or any part thereof, and the good will and name of such existing corporation, and that such existing corporation be dissolved upon the expiration of the period of fifteen days from the filing of the certificate of incorporation of such new corporation in the proper state office.

2. There shall be annexed to the certificate of incorporation of the new corporation, an affidavit by the president or a vice-president and the secretary or an assistant secretary of the existing corporation stating that the consent of the stockholders required by the foregoing subdivision of this section has been duly given.

3. There shall be included in the certificate of incorporation of the new corporation a statement that it is organized to acquire the property, rights, privileges and franchises, or an interest therein or a part thereof, and the good will and name of an existing domestic corporation and a statement of the date of filing of the certificate of incorporation of such existing corporation, the state office where filed, or the special law under which it is organized.

4. The consent of the department of taxation and finance to the filing of such certificate shall be indorsed thereon.

Upon the expiration of the period of fifteen days from the filing of the certificate of incorporation of the new corporation in the proper state office the corporate existence of the old corporation shall cease and it shall be deemed dissolved. Its directors shall proceed to settle its affairs

pursuant to the provisions of section thirty-five of the general corporation law and of subdivisions eight and nine of section one hundred and five and of section one hundred and six of this chapter.

Sec. 29. *Directors as trustees in case of dissolution.* Upon the dissolution of any corporation, its directors, unless other persons shall be designated by law, or by a court of competent jurisdiction, shall be the trustees for its creditors, stockholders or members and shall have full power to settle its affairs, collect and pay its outstanding debts, and distribute to the persons entitled thereto the assets remaining after payment of debts and necessary expenses.

The provisions of sections twenty-seven and twenty-eight shall apply to the meetings and acts of the trustees.

Such trustees shall have power in the corporate name by one or more of their number thereunto designated to transfer and convey its property, and may sue and be sued in such name. They shall jointly and severally be accountable to its creditors, stockholders or members, for the property which shall come into their possession.

Sec. 69. *Consideration for issue of stock and bonds.* No corporation shall issue either shares of stock or bonds, except for money, labor done or property actually received for the use and lawful purposes of such corporation. No shares of stock having par value shall be issued for money in an amount less than the par value of such shares. Any corporation may purchase any property authorized by its certificate of incorporation, or necessary for the use and lawful purposes of such corporation, and may issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this chapter; and in the absence of fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive; and in all statements and reports of the corporation by law required to be pub-

lished or filed, this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported as issued for property purchased.

Opinion of United States Court of Appeals For the Second Circuit

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Decided December 6, 1954

FRANK, Circuit Judge:

The pertinent statutory provisions are set forth in the footnote.[1]

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[1] "26 U.S.C., 1946 ed. Sec. 113: ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

"(a) *Basis (Unadjusted) of Property.* The basis of property shall be the cost of such property; except that . . .

"(6) *Tax-free Exchanges Generally.* If the property was acquired, after February 28, 1913, upon an exchange described in section 112(b) to (e), inclusive, the basis (except as provided in paragraphs (15), (17), or (18) of this subsection) shall be the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or decreased in the amount of loss of the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was made. . . .

"(7) *Transfer to Corporation.* If the property was acquired

"(A) after December 31, 1917, and in a taxable year beginning before January 1, 1936, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, or

"(B) in a taxable year beginning after December 31, 1935, by a corporation in connection with a reorganization,

then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer

The facts are stated in the opinion and findings of the Tax Court, reported in 18 T.C. 1255. In part they read as follows:

"The stockholders of the old corporation, at a special meeting, expressed their desire to dissolve the

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was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or securities of the transferee as the consideration in whole or in part for the transferor.

"(8) *Property Acquired by Issuance of Stock or as Paid-in Surplus.* If the property was acquired after December 31, 1920, by a corporation

"(A) By the issuance of its stock or securities in connection with a transaction described in section 112(b)(5) (including, also, cases where part of the consideration for the transfer of such property, to the corporation, was property or money, in addition to such stock or securities, or

"(B) as paid-in surplus or as a contribution to capital, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. . . .

"Sec. 718 (as added by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974). EQUITY INVESTED CAPITAL.

"(a) *Definition.* The equity invested capital for any day of any taxable year shall be determined as of the beginning of such day and shall be the sum of the following amounts, reduced as provided in subsection (b) . . . .

"(2) *Property Paid-in.* Property (other than money) previously paid in (regardless of the time paid in) for stock, or as paid-in surplus, or as a contribution to capital. Such property shall be included in an amount equal to its basis (unadjusted) for determining loss upon sale or exchange. . . .

"Revenue Act of 1928, c. 852, 45 Stat. 791:

"Sec. 112. RECOGNITION OF GAIN OR LOSS.

"(a) *General rule.* Upon the sale or exchange of property the entire amount of the gain or loss, determined under section

old corporation and to sell the assets and distribute the proceeds. They passed resolutions on March 12, 1930, consenting to the formation of a new company

111 shall be recognized, except as hereinafter provided in this section.

"(b) *Exchanges solely in kind.* . . .

"(4) *Same—Gain of Corporation.* No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan or reorganization, solely for stock or securities in another corporation a party to the reorganization.

"(5) *Transfer to Corporation Controlled by Transferror.* No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities recieved by each is substantially in proportion to his interest in the property prior to the exchange. . . .

"(i) *Definition of reorganization.* As used in this section and sections 113 and 115—

"(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferr or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of reorganization, however effected.

"(2) The term 'a party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the the total number of shares of all the other classes of stock of another corporation.

"(j) *Definition of control.* As used in this section the term 'control' means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation."

of the same name and the dissolution of the old company, 15 days thereafter, as provided by Section 22 of the Stock Corporation Law of New York. It was also resolved to have the directors sell the assets, good will and corporate name of the old company to the new corporation. Preferred stock of the new corporation was to be received for the value of the physical assets and net worth, and common stock of the new corporation aggregating a par value of $750,000 was to be taken in payment for all other property including good will and the right to use the corporate name. The new corporation, Bard-Parker Company, Inc. (hereinafter referred to as the petitioner), was incorporated in New York on April 8, 1930. The old company was automatically dissolved on April 24, 1930. The authorized capital stock of the new corporation was $1,950,000, consisting of 4,500 shares of $100 par value 7 per cent cumulative preferred and 150,000 shares of $10 par value common stock. The petitioner, through its directors, purchased the tangible assets of the old company from the liquidating directors of that corporation on April 28, 1930, for $209,300 par value preferred stock and the assumption of liabilities of $18,855.59. The intangible assets of the old company were purchased for $750,000 par value common stock of the petitioner. The memorandum of agreement states that the old company had been dissolved.

"The liquidating directors of the old company listed the shareholders of that corporation and the number of preferred and common shares to be issued to each in payment of the tangible and intangible assets of the old company. The preferred shareholders of the old company received $50,000 par value in preferred shares of the petitioner. The remaining $159,300 of the purchase price of the tangible assets was paid to the common stockholders of the old company in the ratio in which they owned stock of their corporation. . . . The common stock of the new corporation was issued in the same ratio. . . .

"On the same date the directors of the petitioners authorized the purchase of certain patents and applications, accepting an offer made by Harry B. Arden. These patents and applications purchased by the peti-

tioner for $750,000 through Arden were owned by Morgan Parker. . . .

"Gain or loss was not reported by petitioner or Morgan Parker from the transactions involving the purchase by petitioner of the old company's assets and Morgan Parker's patents.

"J.W.B. Ladd received $50,000 par value in common stock of the petitioner for his services. . . ."

In its excess profits tax returns for the taxable years taxpayer included in its equity invested capital, for the purpose of computing its excess profits tax credit, the full par value of its common stock in the amount of $1,550,000. The Commissioner in his notice of deficiency reduced the invested capital by that amount. The Tax Court sustained the Commissioner's determination in part. With respect to the $50,000 of stock issued for Ladd's services, the Tax Court held that no amount was includible in equity invested in capital. With respect to the $750,000 of stock issued for the old corporation's intangible assets, it held that the amount includible was the cost to the old corporation. With respect to the $750,000 of stock issued for Parker's scissors patents, it held that the amount includible was cost to taxpayer, i.e., the fair market value of the patents at the time they were acquired, which it found ot be $300,000.

Taxpayer appeals from so much of the Tax Court's decisions as is adverse to it. The Commissioner has not cross-appealed.

1. The first question has to do with the intangible assets of the old company, acquired in 1930 in exchange for $750,000 par value of the new company's common stock. The Tax Court held that this was a tax-free acquistion "in connection with a reorganization" under Section 112(b)(4) of the 1928 Act; that therefore the "basis" of those assets, under 28 U.S.C. 1946 ed. Section 113(a)(7), is the same as it would be in the hands of the old company;

and that consequently this "basis" represents the new company's "equity invested capital," relative to those intangible assets, pursuant to 28 U.S.C. 1946 ed. Section 718(a)(2).

Taxpayer contends that the transfer of these assets was not tax-free under Section 112(b)(4) or Section 112(b)(5) of the 1928 Act; that therefore the "basis" of those assets is their market value in 1930 when the new company acquired them in exchange for some of its common stock; and that, accordingly, that value must be used in computing the new company's "equity invested capital" under Section 718(a)(2). In support of this contention, taxpayer advances several arguments:

(A) Section 112(b)(4), by its terms, relates solely to a "reorganization" in which a "corporation" exchanges property for securities in another "corporation." But here, says taxpayer, the parties to the exchange of these assets were (1) some "natural persons," as transferors, and (2) the new corporation as transferee; for, in accordance with the New York statute, the old company was dissolved, title to its assets then vested in its former directors as "liquidating trustees," and those persons transferred the assets of the dissolved old company to the new company.

We cannot agree. We think the Tax Court correctly held that the lequidating directors served merely as a "conduit" through which title passed to the new corporation. The obvious aim of Section 112(b)(4) may not so easily be balked. In *Helvering* v. *Limestone Company,* 315 U.S. 179, 184-185, the Court said that "the separate steps were integrated parts of a single scheme. Transitory phases of an arrangement frequently are disregarded under the sections of the revenue acts where they add nothing of substance to the completed affair. . . . Here there were no more than intermediate procedural devices to enable the new corporation to acquire all the assets of

the old one pursuant to a single reorganization plan."[2] See also *Survuant* v. *Commissioner,* 162 F. (2d) 653 (C.A. 8); *cf. Gregory* v. *Helvering,* 69 F. (2d) 809 (C.A. 2), aff'd. 293 U.S. 465; *Kocin* v. *United States,* 187 F. (2d) 707 (C.A. 2).

We conclude, then, that, in applying Section 112(b)(4), this transaction may not be treated as two transfers—one from the old company to its directors and a second from those directors to the new company—since those two transfers were but procedural steps used to complete what, in substance, constituted a single transfer.[3]

(B) Taxpayer also argues, as follows: Here there were two concurrent transfers in exchange for the stock of a corporation, i.e. the transfer from the old company and the transfer of the patents; in such circumstances, says the taxpayer, "the transaction must meet the tests of Section 112(b)(5) to be non-taxable," and, if it does not, then Section 112(b)(4) must be disregarded, because those subsections are mutually exclusive; and here (so the Tax Court found) Section 112(b)(5) did not fit the transaction, since the interests of the transferors in the stock of the new company was disproportionate to their interests in "the property prior to the exchange."

We think that contention untenable. Section 112(b)(4) and (5) are cumulative, not mutually exclusive. See *Helvering* v. *Cement Investors,* 316 U.S. 527, 533-534; *Britt* v. *Commissioner,* 114 F. (2d) 10 (C.A. 4); *Barker* v. *United States,* 200 F. (2d) 223, 229 (C.A. 6); *Nelson* v. *United States,* 69 F. Supp. 336.

Taxpayer cites cases in which, according to taxpayer, the courts having held that a transaction was not tax-free because it did not meet the tests of Section 112(b)(5), did

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[2] We think that, as the facts were significantly different, Helvering v. Cement Investors, 316 U.S. 527, did not over-rule Helvering v. Limestone Company, 315 U.S. 179.

[3] If United States v. Arcade Co., 203 F. (2d) 230 (C.A. 6), can be said to hold to the contrary, we refuse to follow it.

not go on to consider whether the transaction was tax-free under Section 112(b)(4) or some other "reorganization" subsection. Assuming that taxpayer has correctly described those cases, they cannot be considered as precedents here. See *Webster* v. *Fall,* 266 U.S. 507 511: "Questions which merely lurk in the record, neither brought to the attention of the Court nor ruled upon, are not be considered as having been so decided as to constitute precedents."[4]

(C) A further argument advanced by taxpayer runs thus: The Tax Court found that "the principal reason for the entire transaction was the exploitation of the scissors patents" acquired from natural persons by the new company; therefore, the transfer to the new company of its intangible assets, and the simultaneous transfer of the patents, both in exchange for common stock of the new company, must be regarded as one transaction; so regraded, it cannot come within Section 112(b)(4), which deals exclusively with intercorporate transactions.

We do not agree. There were two separate transfers which did not become transmuted into component steps of a single transfer merely because separate properties were transferred at the same time to one transferee These two transfers were not—as in the case of the transfer by the old company to its liquidating directors and the re-transfer by them to the new company—mere "procedural" steps towards the completion of one transaction. Nor were the two transfers, otherwise distinct, fused into one merely because the interested persons would not have entered into the arrangement unless it involved both

[4] Cf. Helvering v. Cement Investors, 316 U.S. 527, 530 note 1, where the Court said: "In Helvering v. Southwestern Consolidated Corporation [315 U.S. 194], no question as to the applicability of Sec. 112(b)(5) was involved. The only question raised or considered by . . . this Court was whether or not the transaction in question qualified as a 'reorganization' under Sec. 112(g)(1) of the 1934 Act."

transfers contemporaneously. None of the cases cited by the taxpayer leads us to the result that these transactions should escape the tax consequences which would have followed had they been separated in time.

We do not hold that the dominant aim of the interested persons may never be controlling in this area of "tax law." We do hold that, on the facts of this case, there occurred (1) a tax-free reorganization exchange of the old company's intangible assets for new company stock plus (2) a separate non-reorganization exchange of the patents for such stock. Therefore, the "basis" of the intangible assets is that of the old company.[5]

2. We think the Tax Court correctly excluded, from taxpayer's "equity invested capital," the market value of the shares of common stock issued to Ladd in exchange for services. For Section 718(a)(2) of 26 U.S.C., 1946 ed. is explicitly restricted to "property . . . previously paid in"; and services have been held not to constitute "property" for such purposes. *La Belle Iron Works* v. *United States*, 256 U.S. 377, 389; *Simmons Company* v. *Commissioner*, 33 F. (2d) 75 (C.A. 1). Taxpayer argues that Section 69 of the New York Stock Corporation Law provides for the issuance of stock for "labor done" as well as for money or property actually received. We think such a state statute irrelevant in interpreting the provisions of the Federal Revenue Act here applicable.

Affirmed.

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[5] We need not and do not consider whether (a) the interests in the new company were disproportionate for purposes of Section 112(b)(5), or (b) whether the "basis"of the transferred patents is their cost as of the date of transfer in 1930.

Nor have we considered the Commissioner's contention that taxpayer is estopped from now asserting that the exchange in 1930 was not tax-free because taxpayer and its predecessor treated the transaction as a tax-free reorganization in the 1930 tax return.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 630

BARD-PARKER COMPANY, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 3-14)[1] is reported at 18 T. C. 1255. The opinion of the Court of Appeals (Pet. App. 6-14) is reported at 218 F. 2d 52.

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[1] References designated "R." are to the appendix to the taxpayer's brief in the Court of Appeals, references designated "Pet. App." are to the appendix to the petition for a writ of certiorari, and those designated "Appendix" are to the appendix to this brief.

JURISDICTION

The judgment of the Court of Appeals was entered December 6, 1954. (Pet. App. 6.) The petition for a writ of certiorari was filed March 1, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether the amount includible in taxpayer's equity invested capital under Section 718(a) of the Internal Revenue Code of 1939, with respect to intangible property acquired in 1930 from a predecessor corporation, is the par value of the stock it issued in exchange (as taxpayer contends) or the basis of the property in the hands of the predecessor-transferor corporation (as both courts below held). The answer depends on whether the property was acquired by taxpayer "in connection with a reorganization" within the meaning of Section 113(a)(7) of the Internal Revenue Code, and this in turn depends on whether the property was acquired pursuant to a "reorganization" as defined in the Revenue Act of 1928.

2. Whether the courts below erred in excluding from taxpayer's equity invested capital the value of stock issued for services.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutory provisions and Treasury Regulations are set forth in the Appendix, *infra*, pp. 20-26. The statutory provisions consist of portions of Sections 113(a) and 718(a) of the Internal Revenue Code of 1939, and of Section 112(a), (b),

(i), and (j) of the Revenue Act of 1928, c. 852, 45 Stat. 791. The Treasury Regulations consist of portions of Sections 29.113(a)(7)-1 and 29.113(a)-(8)-1 of Regulations 111, promulgated under the Code; of Section 35.718-1 of Regulations 112, promulgated under the Code; and of corresponding provisions of Treasury Regulations 103 and 109, promulgated under the Code.

STATEMENT

The facts as stipulated and found by the Tax Court (R. 3-8) may be summarized as follows:

The taxpayer corporation (sometimes referred to as the "new" corporation) is the successor of a New York corporation of the same name (sometimes refered to as the "predecessor" or "old" corporation), which was organized in 1916 and engaged in the manufacture and sale of patented detachable-blade surgical knives. After 1925 the old corporation had outstanding 120 shares of $50 par value common stock, of which 90 were owned by Morgan Parker and 30 by James White. (R. 3.)

A "Syndicate Agreement" was entered into on July 28, 1927, between Parker, the old company, and other persons referred to as "subscribers." The agreement contemplated that detachable-blade scissors invented by Parker would be produced in a limited quantity by the old company to determine the best method of production and the probable commercial market, and that a new corporation would then be organized. The stock in the new corporation was to be issued for the scissors patents

except for the required number of shares issued for cash for organizational purposes. Parker was to receive one-fourth of the stock, a similar portion was to be given to the subscribers, and one-half to the old corporation. The old company agreed to authorize the issuance of $50,000 of seven percent preferred stock of $100 par value to be sold to the subscribers and to use the proceeds in a special fund for the development of the scissors. The subscribers were given the election of converting their preferred shares into stock of the new corporation. (R. 3-4.)

Subscriptions to the preferred stock of the old company, aggregating $50,000, were made by the subscribers, persons not previously interested in the old corporation. In 1928, J. W. B. Ladd was employed by the old company as a mechanical engineer and he engaged in inventive work upon the scissors resulting in improving patents issued to Parker and himself. In March, 1930, the development work had reached the stage where manufacturing could begin, but it was decided that the initial commercial venture would be in the small field of surgical scissors. It appeared advantageous commercially and economically to have the new corporation market the scissors under the name of the old corporation. (R. 4.) Accordingly, the stockholders of the old corporation, at a meeting held March 12, 1930, passed resolutions consenting to the formation of a new company of the same name and the dissolution of the old company, fifteen days thereafter, as provided by Section 22 of the

Stock Corporation Law of New York. It was also resolved to have the directors sell the assets, good will, and corporate name of the old company to the new corporation. Preferred stock of the new corporation was to be received for the physical assets and net worth, and common stock for all other property including good will and the right to use the corporate name. The new corporation (taxpayer) was incorporated in New York on April 8, 1930. The old company was automatically dissolved on April 24, 1930. The authorized capital stock of the new corporation was $1,950,000, consisting of 4,500 shares of $100 par value seven percent cumulative preferred and 150,000 shares of $10 par value common stock. The taxpayer purchased the tangible assets of the old company from the liquidating directors of that corporation on April 28, 1930, for $209,300 par value preferred stock and the assumption of liabilities of $18,855.59. The intangible assets of the old company were purchased for $750,000 par value common stock of the taxpayer. The preferred shareholders of the old company received $50,000 par value in preferred shares of the taxpayer. The remaining preferred was issued to the common stockholders of the old company in the ratio in which they owned its stock, i. e., seventy-five percent to Parker and twenty-five percent to White. The common stock of taxpayer was issued to Parker and White in the same ratio. (R. 5-6.)

On the same date (April 28, 1930), taxpayer's directors authorized the issuance of $750,000 of taxpayer's common stock in exchange for certain pat-

ents and applications owned by Parker. These shares were issued to various individuals, including Parker. Additional capital was obtained by taxpayer through the installment sale for cash of $101,000 par value preferred stock, principally to the original subscribers for preferred stock of the old corporation. (R. 6.)

Ladd received $50,000 par value common stock of the taxpayer for his services resulting in improvements to the detachable-blade scissors. An amendment of taxpayer's charter reducing the authorized preferred stock from 4,500 to 4,000 shares of $100 par value, and increasing the authorized common stock from 150,000 to 155,000 shares of $10 par value, was made in order to make this distribution possible. (R. 7.)

The balance sheet of the old company for the year 1929 listed its "Patents and developments" at $38,325.15, and "Other assets" at $236,975.60, and liabilities at $28,014.33. (R. 7.)

Gain or loss was not reported by taxpayer or Parker from the transactions involving the purchase by taxpayer of the old company's assets and Parker's patents. (R. 6.)

In its excess profits tax returns for the taxable years taxpayer included in its equity invested capital, for the purpose of computing its excess profits tax credit, the full par value of its common stock in the amount of $1,550,000. The Commissioner in his notice of deficiency reduced the invested capital by that amount. (R. 8.) The Tax Court, in a decision reviewed by the full court, sustained the

Commissioner's determination in part. With respect to the $50,000 of stock issued for Ladd's services, it held that no amount was includible in equity invested capital. (R. 8-9.) With respect to the $750,000 of stock issued for the old corporation's intangible assets, it held that the amount includible was the cost to the old corporation. (R. 9-11.) With respect to the $750,000 of stock issued for Parker's scissors patents, it held that the amount includible was cost to taxpayer, i.e., the fair market value of the patents at the time they were acquired, which it found to be $300,000. (R. 11-14.) Taxpayer's motion for reconsideration was denied. (R. 2.) It appealed from so much of the Tax Court's decision as was adverse to it, and the Court of Appeals (Clark, Frank and Harlan, JJ.) unanimously affirmed. (Pet. App. 6-14.)

ARGUMENT

The decision below, affirming that of the Tax Court, is correct. The case turns on its own facts, there is no conflict, and no occasion for further review.

In 1930 the assets of taxpayer's predecessor corporation were distributed in liquidation to its directors, acting as liquidating trustees, who then retransferred them to the newly formed taxpayer corporation, in exchange for part of taxpayer's stock. At the same time, taxpayer issued some of its shares to an individual (Parker) in exchange for patents, and issued additional shares to another individual (Ladd) for services. A controlling in-

terest in the stock of the taxpayer corporation remained in the stockholders of the predecessor. The ultimate issue presented is the amount includible in taxpayer's equity invested capital under Section 718(a)(2) of the Internal Revenue Code of 1939 (Appendix, *infra,* p. 22), for purposes of computing its excess profits tax liability for the taxable years (1941-1943) on account of the properties and the services for which its stock was issued. With respect to the properties, the answer depends on their "basis" under Code Section 113(a) (Appendix, *infra,* pp. 20-22), which in turn depends on whether the properties had been acquired in a tax-free exchange under the provisions of Section 112 of the 1928 Revenue Act (Appendix, *infra,* pp. 23-24). With respect to the services, the answer depends on whether the term "property" appearing in Code Section 718(a)(2) embraces services.

Viewing the transfer of the old corporation's assets to the liquidating trustees and their retransfer to taxpayer as component steps in a single transaction, the Tax Court unanimously held that the exchange was a tax-free reorganization within Section 112(b)(4) of the 1928 Act, with the result that under the carry-over provisions of Code Section 113(a)(7) the basis of these assets to taxpayer was the same as in the hands of the old corporation. With respect to the individually owned patents which were contemporaneously transferred to taxpayer (the non-reorganization exchange), the Tax Court held that this exchange did not meet the

non-recognition requirements of Section 112(b)(5) of the 1928 Act; that consequently the carry-over provisions of Code Section 113(a)(8) were inapplicable; and that the basis of the patents was their cost to taxpayer. As for the stock issued for services, the Tax Court held that no amount was includible in taxpayer's equity invested capital. Taxpayer appealed from that portion of the Tax Court's decision which was unfavorable to it, i.e., with respect to the amount includible in equity invested capital on account of the stock issued for the predecessor's assets and for the services,[2] and the Court of Appeals affirmed.

I

Stock Issued for Predecessor's Assets

1. Section 718(a)(2) of the Internal Revenue Code authorizes the inclusion in equity invested capital of "Property * * * paid in * * * for stock", in an amount equal to the "basis" of the property. Under Code Section 113(a) the basis of property is its "cost" to the taxpayer, with certain exceptions. One of the exceptions relates to property acquired by a corporation "in connection with a reorganization." Section 113(a)(7). Whether property was

[2] Taxpayer accepted the Tax Court's holding that the exchange of stock for Parker's patents was a taxable exchange, and that therefore the cost of the patents to taxpayer was includible in equity invested capital. It challenged the holding that (1) the exchange of the old corporation's assets for taxpayer's stock was a tax-free reorganization, requiring carry-over of the old corporation's basis, and (2) no amount was includible in equity invested capital on account of Ladd's services.

acquired in connection with a "reorganization" depends on the statutory definition of that term, and, since the property here involved was acquired in 1930, the 1928 Revenue Act applies. Section 112(i)(1)(B) of that Act defines a reorganization as a "transfer by a corporation of all or a part of its assets to another corporation," if immediately thereafter the transferor or its stockholders or both are in control of the transferee corporation. If a reorganization occurred, then Code Section 113(a)(7) requires that the basis of the property transferred be "the same as it would be in the hands of the transferor" corporation,[3] with adjustments not here material. The provision for carry-over of basis contained in Section 113(a)(7) is functionally related to the provision for non-recognition of gain or loss upon a reorganization exchange. See Section 112(b)(4) of the Revenue Act of 1928 and the corresponding section of the Code. Its manifest purpose is to prevent a corporation acquiring property in connection with a reorganization from using a higher or "stepped-up" basis for the property where no taxable gain was recognized upon the exchange. See *Helvering* v. *Cement Investors,* 316 U. S. 527, 534; 3 Mertens, *Law of Federal Income Taxation,* Section 21.95.

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[3] Paragraph (A) of Code Section 113(a)(7) provides that where (as here) the reorganization occurred before 1936, then the transferee is required to carry over the transferor's basis only if immediately after the transfer, "an interest or control in such property of 50 per centum or more remained in the same persons or any of them." It is undisputed that, if the transaction in question otherwise comes within Section 113(a)(7), it also satisfies the control requirement.

2. The undisputed documentary evidence clearly warrants the Tax Court's conclusion (R. 9-11) that the property in question was acquired by taxpayer in 1930 from the predecessor corporation in connection with a non-taxable corporate "reorganization" as defined in the 1928 Act, and hence that taxpayer is required by Code Section 113(a)(7) to take the same basis for the property as it had in the hands of the predecessor-transferor corporation. Upon its organization in 1930, taxpayer acquired the net assets of an existing corporation of the same name, in exchange for its stock. (R. 4-5, 31-36; Stip. Ex. 24-X.[4]) The transfer of the old corporation's assets to the new was accomplished pursuant to Section 22 of the New York Stock Corporation Law. (R. 5, 31-36.) That section (Pet. App. 3-5) authorizes a corporation to transfer its property, including its "good will and right to use the corporate name," to a new corporation of the same name, and to become automatically dissolved fifteen days after the successor corporation's charter is filed. In conformity with the provisions of that section, the stockholders of the old corporation passed resolutions in March of 1930 consenting to its dissolution and the formation of a new corporation, and authorizing the directors of the old corporation to convey all its assets to the new one. (R. 31-34.) Preferred stock of the new corporation was to be exchanged for the "physical assets;" and common stock "for all other property, including

[4] Joint Exhibits 1-A through 25-Y are attached to the stipulation of facts.

the good will and the right to the use of the corporate name." (R. 32-33.) The new corporation (taxpayer) was organized on April 8, 1930, and the old one was dissolved on April 24, 1930. A few days later, on April 28, 1930, the directors of the old corporation, acting as "liquidating directors,"[5] conveyed its assets to the new corporation, which assumed the liabilities of the old, and a controlling interest in the stock of the new corporation remained in the stockholders of the old. (R. 5-7, 15-30.)

On the basis of these uncontroverted facts, the court below properly approved the Tax Court's conclusion that the transfer of the assets of the old corporation to the new constituted tax-free reorganization within the meaning of Section 112(i)(1)(B) and (b)(4) of the 1928 Act, and that consequently taxpayer was required under Code Section 113(a)(7) to use the basis of the old corporation. In the language of Section 112(i)(1)(B) of the 1928 Act, the applicable statutory definition of a reorganization, there was "a transfer by a corporation of all * * * of its assets to another corporation."[6]

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[5] By virtue of Section 29 of the New York Stock Corporation Law (Pet. App. 5), the directors of a dissolved corporation act as liquidating trustees, and the corporation continues in existence for the purpose of winding up its affairs.

[6] Additional support for the Tax Court's conclusion is furnished by the tax treatment which taxpayer itself accorded the transaction in the year (1930) in which it took place. No gain or loss was reported upon the exchange of taxpayer's stock for the predecessor's assets. (R. 6.) Instead, a single income tax return was filed on behalf of both taxpayer and its predecessor for the calendar year 1930, in which the exchange was treated as a non-taxable reorganization. (Stip. Ex. 5-E, p. 3.)

3. Taxpayer here challenges the Tax Court's decision, as it did in the court below, upon two alternative theories: (1) The transfer by the old corporation of its assets and the concurrent transfer by Parker of his individually owned assets (patents) must be treated as component parts of a single transaction which is to be tested by the provisions of Sections 112(b)(5) and 113(a)(8), rather than by those of Sections 112(b)(4) and 113(a)(7) (Pet. 8-10, 12-13); (2) even if Sections 112(b)(4) and 113(a)(7) are applicable, there was no corporate reorganization because the transfer of the old corporation's assets to the new must be treated as two separate and unrelated transactions —a transfer by the old corporation to the liquidating trustees, and a transfer by the latter to the new corporation. (Pet. 11-12). The court below properly rejected both theories.[7]

(a) Transfers of different properties by different transferors are not transformed into component steps of a single transaction, for purposes of applying the basis provisions of Section 113(a), simply because the properties are transferred at the same time to the same transferee. The transfer of the predecessor corporation's property, and the transfer of Parker's property, were not procedural steps in one transaction—as were the preliminary transfer of the assets of the predecessor to its liquidating directors, and the latters' immediate retransfer of those same assets to the new corpora-

[7] In the court below taxpayer advanced these theories in reverse order, and accordingly they were there dealt with in that order.

tion. The old corporation's transfer of its assets via its directors, and Parker's transfer of his assets, constituted separate transfers. The "property" and the "transferor," as those terms are used in Section 113(a)(7), were in each instance different.

As the court below noted (Pet. App. 12-13), the fallacy in taxpayer's argument lies in its assumption that the non-recognition provisions of Section 112(b)(4) and (5), and the complementary basis provisions of Section 113(a)(7) and (8), are mutually exclusive rather than cumulative exceptions to the general rules of Sections 112(a) and 113(a), respectively. The exceptions to Section 112(a) contained in Section 112(b)(4) and (5), and the correlative exceptions to Section 113(a) contained in Section 113(a)(7) and (8), frequently overlap. *Helvering* v. *Cement Investors, supra* (pp. 533-534); *Barker* v. *United States,* 200 F. 2d 223, 229 (C. A. 9th); *Britt* v. *Commissioner,* 114 F. 2d 10, 13-14 (C. A. 4th); *Bacon* v. *Commissioner,* 4 T. C. 1107; Section 29.113(a)(8)-1 of Treasury Regulations 111 (Appendix, *infra,* p. 25). An intercorporate exchange of property for stock may constitute a "reorganization" falling within the exception provisions of Sections 112(b)(4) and 113(a)(7) regardless of whether or not it falls within those of Sections 112(b)(5) and 113(a)(8), and vice versa.[8] No reason exists, and

[8] Similarly, an exchange which does not fall within either Section 112(b)(4) or (5) (and complementary Sections 113(a)(7) or (8)) may come within some other exception contained in Section 112(b) to (e) and complementary Section 113(a)(6).

none is suggested by taxpayer, for supposing that Congress intended to prevent an intercorporate exchange of property for stock from qualifying as a reorganization merely because individually owned property, or cash, is contemporaneously transferred.

(b) In alternatively contending that the transfer of the old corporation's assets to the new was not a reorganization, because of the intervening transfer of those assets to the liquidating trustees, taxpayer has disregarded the established rule that the transaction is to be viewed as a whole from beginning to end, not according to its intermediate procedural steps. *Helvering* v. *Limestone Co.*, 315 U. S. 179; *Survaunt* v. *Commissioner*, 162 F. 2d 753 (C. A. 8th); *Ahles Realty Corp.* v. *Commissioner*, 71 F. 2d 150 (C. A. 2d), certiorari denied, 293 U. S. 611; *Heller* v. *Commissioner*, 147 F. 2d 376 (C. A. 9th), certiorari denied, 325 U. S. 868; *Commissioner* v. *Ashland Oil & R. Co.*, 99 F. 2d 588 (C. A. 6th), certiorari denied, 306 U. S. 661. The Tax Court aptly observed (R. 10), as did the court below (Pet. App. 11-12), that the liquidating trustees acted merely as a "conduit" of title from the old corporation to the new. Taxpayer is here advancing essentially the same argument that was rejected in the *Limestone* and *Survaunt* cases, *supra*, where the transaction was held to constitute a reorganization despite an intervening transfer. In this case, as in those cases, the fact that title to the corporate assets was temporarily placed in an intermediary transferee, who then retransferred title to the new corporation, does not render the completed trans-

action any the less a corporate reorganization. The "transferor" of the assets, within the meaning of Code Section 113(a)(7) and Section 112(i)(1)(B) of the 1928 Act, was the predecessor corporation and not its liquidating trustees.

4. The decision below is not in conflict with any other decision. Taxpayer relies (Pet. 8-10) for conflict chiefly upon decisions to the effect that a single transaction may not be viewed for tax purposes according to its component steps. However, both courts below accorded full recognition to that principle by viewing the transfer of the old corporation's assets to the liquidating trustees and the retransfer of those same assets to the new corporation as steps in a single reorganization plan, rather than as separate transactions. None of the cases support taxpayer's position that *transfers of different properties by different transferors* must be viewed as if they were transfers of the same property by the same transferor for purposes of applying the basis provisions of Section 113(a)(7); indeed, none of them presented such an issue. As the court below pointed out (Pet. App. 14), what occurred here was a combination of a tax-free reorganization exchange of the old corporation's assets for the new corporation's stock, plus a separate non-reorganization exchange of individually owned assets for stock in the same corporation. Nothing of the sort occurred in the cases relied upon by taxpayer.

Nor is there any conflict with *United States* v. *Arcade Co.*, 203 F. 2d 230 (C. A. 6th), certiorari

denied, 346 U. S. 828, upon which taxpayer seems to place special reliance. (Pet. 11.) The appellate court there affirmed the trial court's determination that no reorganization was effected because (p. 233) there was no reorganization plan, the former stockholders having become the "absolute owners" of the assets without any obligation to transfer them to a new corporation. No comparable situation is here presented. On the contrary, as is plain from the resolutions adopted at their special meeting on March 12, 1930 (Ex. 19-S, R. 31-33),[9] the stockholders of the old corporation planned from the start to form a new one (pursuant to Section 22 of the New York Stock Corporation Law) and to transfer to it through their directors (acting as liquidating trustees under Section 29 of that Law) the assets of the old corporation.[10]

As for *United Carbon Co.* v. *Commissioner,* 90 F. 2d 43 (C. A. 4th), upon which taxpayer also places special emphasis (Pet. 13-14), the issue of whether the transaction constituted a reorganization was not even raised. Significantly, the *United Carbon* case was distinguished by the very court which decided it in *Britt* v. *Commissioner, supra,* where the same transaction was involved and the question whether a reorganization occurred was presented for the first time. In the *Britt* case it

[9] See also Exhibits 8-W, 11-K, 20-T, 24-X.

[10] In a footnote to its opinion (Pet. App. 12), the court below observed that "if" the *Arcade* decision could be said to be contrary to its own decision, it refused to follow that decision. Since the *Arcade* case is plainly distinguishable, no conflict exists.

was held that a reorganization did occur, and the decision below is in complete harmony with that decision.

II

Stock Issued for Services

The court below correctly sustained the Tax Court's determination that no amount was includible in taxpayer's equity invested capital on account of the stock issued for Ladd's services. Equity invested capital as defined in Code Section 718(a)(2) is expressly limited to "property * * * paid in " for stock. It is settled that only money or property actually embarked in the enterprise is includible in equity invested capital. *LaBelle Iron Works* v. *United States,* 256 U. S. 377, 387; *Simmons Co.* v. *Commissioner,* 33 F. 2d 75 (C. A. 1st), certiorari denied, 280 U. S. 588; *Warner Co.* v. *Commissioner,* 11 T. C. 419, 432-434, affirmed *per curiam,* 181 F. 2d 599 (C. A. 3d); *Cleveland Graphite Bronze Co.* v. *Commissioner,* 10 T. C. 974, 986-987, affirmed *per curiam,* 177 F. 2d 200 (C. A. 6th); *Palomar Laundry* v. *Commissioner,* 7 T. C. 1300. Taxpayer does not claim that there is any conflict with this aspect of the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
HARRY BAUM,
Special Assistants to the Attorney General.

MARCH, 1955.

APPENDIX

Internal Revenue Code of 1939:

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(6) *Tax-free Exchanges Generally.*—If the property was acquired, after February 28, 1913, upon an exchange described in section 112(b) to (e), inclusive, the basis (except as provided in paragraphs (15), (17), or (18) of this subsection) shall be the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was made.* * *

(7) *Transfers to Corporation.*—If the property was acquired—

(A) after December 31, 1917, and in a taxable year beginning before January 1, 1936, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more re-

mained in the same persons or any of them, or

(B) in a taxable year beginning after December 31, 1935, by a corporation in connection with a reorganization,

then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or securities of the transferee as the consideration in whole or in part for the transfer.

(8) *Property Acquired by Issuance of Stock or as Paid-in Surplus.*—If the property was acquired after December 31, 1920, by a corporation.

(A) by the issuance of its stock or securities in connection with a transaction described in section 112 (b) (5) (including, also, cases where part of the consideration for the transfer of such property to the corporation was property or money, in addition to such stock or securities), or

(B) as paid-in surplus or as a contribution to capital,

then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made.

* * * * *

(26 U.S.C. 1952 ed., Sec. 113.)

SEC. 718 [as added by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974]. EQUITY INVESTED CAPITAL.

(a) *Definition.*—The equity invested capital for any day of any taxable year shall be determined as of the beginning of such day and shall be the sum of the following amounts, reduced as provided in subsection (b)—

* * * * *

(2) *Property Paid In.*—Property (other than money) previously paid in (regardless of the time paid in) for stock, or as paid-in surplus, or as a contribution to capital. Such property shall be included in an amount equal to its basis (unadjusted) for determining loss upon sale or exchange.
* * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 718.)

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges solely in kind.*—

* * * * *

(4) *Same—Gain of Corporation.*—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(5) *Transfer to Corporation Controlled by Transferor.*—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

* * * * *

(i) *Definition of reorganization.*—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, * * * .

* * * * *

(j) *Definition of control.*—As used in this section the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29. 113(a)(7)-1 [As amended by T. D. 5402, 1944 Cum. Bull. 229, 237]. *Property Acquired by Corporation in Reorganization After December 31, 1917.*—Section 113(a)(7) sets forth the conditions under which the basis of

property acquired by a corporation after December 31, 1917, in connection with a reorganization as defined in section 112(g), or a corresponding provision of a prior Revenue Act, is the same as it would be in the hands of the transferor, increased or decreased as therein provided in the amount of gain or loss recognized to the transferor under the applicable revenue law. In the case of property so acquired in a taxable year beginning prior to January 1, 1936, such basis is applicable only if immediately after the transfer there remained in the same persons or any of them an interest or control in such property of 50 percent or more. * * *

* * * * *

Sec. 29. 113(a)(8)-1. *Property Acquired by a Corporation After December 31, 1920.*—The acquisition of property by a corporation after December 31, 1917, by the issuance of its stock or securities may not fall within the provisions of section 113(a)(7), because of the fact that the property was not acquired in connection with a reorganization. If, however, the acquisition of such property occurred after December 31, 1920, and falls within the provisions of section 113(a)(8), the limitations therein imposed upon the basis of such property are applicable.

* * * * *

Treasury Regulations 112, promulgated under the Internal Revenue Code of 1939:

* * * * *

Sec. 35.718-1. *Determination of Daily Equity Invested Capital—Money and Property Paid in.*—* * * For the purpose of determining equity invested capital, the amount of any property paid in is the unadjusted basis to the taxpayer for determining loss upon a sale or exchange under the law applicable to the taxable year for which the invested capital is being computed. * * *

* * * * *

The provisions of Sections 19.113(a)(7)-1 and 19.113(a)(8)-1 of Treasury Regulations 103, and Section 30.718-1 of Regulations 109, promulgated under the Internal Revenue Code and applicable to the year 1941, are substantially the same as the foregoing.

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